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(E.D.N.Y. 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -against- ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE,FENNER & SMITH, ET AL., Defendants.	MEMORANDUM AND ORDER CV-902510

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WEINSTEIN, J.:

This case reveals the sophisticated financial operations of an international criminal syndicate. It involves more than ten million dollars in wire transfers and deposited funds seized by the government

as the traceable proceeds of illegal money-laundering and narcotics transactions. The moneys were alleged by the government to be subject to forfeiture under 21 U.S.C §881 et seq (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). Claimants had the burden at trial of proving either that each amount was not traceable to drug sales or that the claimants were unaware of the taint. After a two-month trial, the jury found that eighteen of the twenty-two amounts seized were forfeitable. For three amounts claimed by two claimants the jury determined that the funds were not the traceable proceeds of illegal money-laundering and narcotics transactions, and for one amount the jury found that the claimant was an innocent owner.

Claimants who received an adverse jury decision move for judgment notwithstanding the verdict or for a new trial; those motions are denied. Their motions to stay execution of the judgment during the appeal without posting a supersedeas bond are granted. Claimants supported by the jury verdict move to release the res; that motion is granted. The government moves to stay payment of proceeds to two claimants on the ground that they are represented by a fugitive; that motion -- perhaps the most interesting in the case -- is denied.

I. FACTS

Most of the funds seized and forfeited are the proceeds of a well-organized multinational organization based in the city of Cali, Colombia and led by a fugitive named Jose Santa Cruz

Londono. Londono and others conducted extensive narcotics trafficking and money-laundering activities involving hundreds of millions of dollars and thousands of kilograms of cocaine smuggled into the United States.

The Londono organization utilized many sophisticated strategies to launder narcotics proceeds. Electronic funds transfers from companies nominally in the clothing manufacturing or import-export business moved currency internationally; cars filled with cocaine were driven from Florida to New York, where the drugs were exchanged for cash and driven back to Florida (with the money at times smelling so strongly of drugs and drug-processing ingredients that it had to be literally washed

before it could be counted); shell

corporations in Panama and Colombia electronically transferred money to Europe and elsewhere; huge amounts of cash were flown by plane to Panama, unloaded, and deposited in banks accustomed to such practices; drug dollars were exchanged on the black market in Colombia for Colombian pesos; shipments of manufactured goods from Colombia to Panama were "lost" to cover up dollar transfers; "loans" were made and paid the same day; and many other procedures were used to disguise the true source and nature of the funds.

Extensive corporate and banking records from all over the world were the primary basis for the government's case. Claimants used corporate records, letters rogatory, testimony of those with knowledge of claimants' activities, and

still and video pictures purporting to show the operations of their manufacturing plants in Colombia.

The Chief of the Drug Enforcement Administration Financial Intelligence Group, Cheryl Holmes, testified at trial after reviewing the voluminous bank and corporate records seized. She traced the links between numerous Panamanian shell corporations, which sent and received electronic funds transfers, and the Londono enterprise. Certified Public Accountant Aram Kostoglian, another government witness, testified that the cash receipts, corporate records, and bank statements of the claimant corporations were inconsistent with the types of records held by legitimate companies in Colombia and elsewhere. Several former Londono associates who had

pled guilty also testified at trial to the illegal nature of the various enterprises utilized by claimants; one, who dealt in gold as a cover-up, described the counting and re-packaging of huge stacks of United States currency.

In connection with the money-laundering scheme, substantial sums of money were electronically transferred into and out of bank accounts in many countries including the United States. See generally Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992) (describing the wire transfers). Officials of several European countries began cooperating in 1989 investigating the suspected drug-money-laundering activities of Jose Santa Cruz Londono.

The inquiry began in Luxembourg and culminated in the seizure of funds in New York and abroad during the summer of 1990.

In September 1989, using a wiretap the Luxembourg Surété Publique intercepted a telephone call between Londono in Colombia and Jose Franklin Jurado-Rodriguez, a Londono associate, in Luxembourg. Jurado reported to Londono that he had successfully opened bank accounts using the name of Londono's father-in-law, and that he planned to set up several shell companies to assist in the money-laundering enterprises. The Surété learned through wiretaps and faxtaps that another Londono associate, Edgar Alberto Garcia-Montilla, was opening bank accounts throughout Europe in the names of Londono's parents-in-law,

Heriberto Castro-Mesa and Esperanza Rodriguez de Castro.

In June 1990, Jurado, Garcia, and a third associate Ricardo Mahecha-Bustos, were observed by European law enforcement officers during a ten-day period traveling and depositing large sums of money in accounts in Italy, Luxembourg, Belgium, Denmark, Sweden, Germany, and the Netherlands. They were arrested when they returned to Luxembourg on money-laundering charges after a lengthy trial.

Heavy wire transfer activity followed the three arrests. Using memoranda and bank records seized at the time of the arrests, officials from several countries were able to identify bank accounts around the world connected to the complex drug money-laundering scheme. In July and August 1990

approximately thirty million dollars was seized in Europe and sixteen million dollars was seized in Panama. In the United States, several American banks having correspondent banking relationships with Panamanian and Colombian banks were instructed by the United States Attorney to seize certain funds on deposit and wire transfers. The seized funds, totaling over ten million dollars, were the subject of this All Funds action.

Pursuant to a succession of amended complaints and supplemental warrants the banks were ordered by the United States Attorney to attach the identified accounts and wire transfers and pay the money into court pending the outcome of a plenary trial. In a separate action by claimants against the banks which seized

the funds, summary judgment was granted for the defendant banks. See Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). Another related action, by claimants against the United States Attorneys who ordered the banks to seize the funds, was dismissed for failure to state a claim. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision).

Testimony at trial revealed an officially sanctioned parallel unofficial street market in dollars in Colombia. There was testimony that it is common knowledge in the streets and board rooms of Colombia that the source of the millions of American dollars in circulation in this "black" market is

largely the drug trade in New York and other American cities.

II. LAW

As the "drug was" has escalated, the number of forfeiture cases in the United States has burgeoned. Taking away the profits of drug crimes through forfeiture is a powerful weapon to cripple drug-trading enterprises. Unfairly wielded it can place commercial enterprises at a terrible disadvantage. It skirts the edge of due process. See, e.g., United States v. $8,850 in United States Currency, 461 U.S. 555, 565-66 (1983) (balancing test set out in speedy trial context in Barker v. Wingo, 407 U.S. 514, 530 (1972), applies to determine reasonableness of delay in forfeiture proceedings). Even when a claimant is

successful in fending off ultimate forfeiture, the loss of use of the seized funds for months or years while the case drags on can cripple a business. See id. at 565 ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."). The substantive law, procedures, and allocation of burdens of proof in forfeiture cases differ markedly from other civil proceedings, and give the United States prosecutor a substantial edge. See generally Edward M. Genson & Mark W. Martin, A Guide to Handling Federal Narcotics Forfeiture Cases, 79 Ill. B.J. 180 (1991) (discussing forfeiture procedures).

The government brought these proceedings under 21 U.S.C. § 881(a)(6), which provides for the forfeiture of

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such and exchange . . .

The procedures applied in civil forfeiture proceedings are those "law[s] relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs law." 21 U.S.C. § 881(d); United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984).

Burdens of proof are allocated by 19 U.S.C. § 1615. Under that section, the burden of proof is on the claimant, "[p]rovided that probable cause shall be first shown for the institution of such suit or action, to be judged . . . by the

court." To begin forfeiture proceedings the government must first demonstrate that there was probable cause to institute the action. It must demonstrate that there are "reasonable grounds" to believe that the property is subject to forfeiture. United States v. Banco Cafetero Panama, 197 F.2d 1154, 1160 (2d Cir. 1986). "These grounds must rise above the level of mere suspicion but need not amount to . . . 'prima facie proof.'" Id.

The reasonable ground standard is less stringent than the preponderance of the evidence standard. United States v. 303 W 116th Street, N.Y., N.Y., 901 F.2d 288, 291 (2d Cir 1990). The government need not link the funds to a particular narcotics transaction, but rather must "connect the property with narcotics

activity . . . ." Banco Cafetero, 797 F.2d at 1160. In satisfying its burden, the government may demonstrate probable cause that the property itself, apart from the actions of the owner, is connected to narcotics activity. See id.; see also United States v. One 1978 Chrysler LeBaron, 531 F. Supp. 32, 34 (E.D.N.Y. 1981) (innocence of owner does not by itself prevent forfeiture). This reflects the legal fiction that the object itself is the wrongdoer. Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 9212 (E.D.N.Y. 1992); United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S>D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd

762 F.2d 991 (2d Cir. 1985).

Probable cause is "judged . . . by the court." 19 U.S.C. § 1615; United States v. Sixteen Cases of Silk Ribbons, 27 F. Cas. 1099 (D.C.N.Y. 1870) (question of whether probable cause shown so as to shift burden to claimants is a question for the court); Three Thousand One Hundred and Nine Cases of Champagne, 23 F. Cas. 1168 (D.C.N.Y. 1867) (same). Hearsay is admissible to support the finding of probable cause. United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989) (hearsay proper, since holding otherwise would undermine Congress's intentional shifting of the burdens in forfeiture cases). As the Second Circuit has explained:

> In view of the unusual relative burdens of proof in civil forfeiture

> proceedings, this court, as well as a number of other circuits, has recognized an exception to the requirements of Rule 56(e) that supporting and opposing affidavits be based upon personal knowledge and admissible evidence, allowing the government to establish probable cause on the basis of hearsay affidavits.

United States v. 15 Black Ledge Drive, Marlborough, Ct., 897 F.2d 97, 101 (2d Cir. 1990). Circumstantial evidence may be relied upon to show probable cause. United States v. $2,500 in United States Currency, 689 F.2d 10, 16 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984). In the instant case, first a magistrate judge and then a district judge de novo determined that the government had probable cause to believe the funds were forfeitable. The district court's hearing on probable cause required three trial days in 1991. Post-hearing motions

to reconsider the probable cause issue were denied. See United States v. All Funds et al., __ F. Supp. __, 1992 WL 37087 (E.D.N.Y. 1992).

Once the government has demonstrated probable cause, "the burden of proof shall lie upon" the claimant. 19 U.S.C. § 1615. Standing is "a threshold issue" for a claimant wishing to contest forfeiture. United States v. One 1982 Porsche 928, Three-Door, License Plate 1986/NJ Temp/534807, 732 F.Supp. 447, 451 (S.D.N.Y. 1990). If the claimant does not have standing, "the court lacks jurisdiction to consider his challenge of the forfeiture." Id. A claimant need not have actual or constructive ownership to have standing; even a possessory interest in the property is sufficient. United States v. $37,590.00, 736 F. Supp.

1272, 1276 (S.D.N.Y. 1990).

If a claimant has standing, it bears the burden of proving by a preponderance of the evidence either 1) that the funds did not have their source in illegal drug transactions and money-laundering, or 2) that it did not know or constructively know -- through conscious avoidance of positive knowledge -- the source and nature of the funds as drug-related (the innocent owner defense). United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989).

The innocent owner defense is set out in the statute:

> [N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have committed or omitted without [his] knowledge . . . .

21 U.S.C. § 881(a)(7). "Owner" is

defined as "any person with a recognizable legal or equitable interest in the property seized." United States v. One Parcel of Real Property, 831 F.2d 566, 567 (5th Cir. 1987) (citing legislative history). Ascertaining knowledge of corporate claimants requires examining the contents of corporate books and records and the actions taken by persons acting as corporate agents.

To satisfy its burden of proof the claimant may not simply attack the finding of probable cause. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972 (1991). It has the "ultimate burden of proving that the factual predicates for

forfeiture have not been met." Banco Cafetero, 797 F.2d at 1160. If the claimant cannot establish that the funds are untainted or that it is an innocent owner, the property is forfeited.

The structure of this kind of case is inherently unfair to claimants which must prove that their money is legitimate after the funds have already been seized by the government. The government needs only to show probable cause to seize. The difficulty in proving in an American court the legitimate origins of particular assets from abroad is pronounced.

Foreign enterprises conducting business in a foreign language utilizing business practices different from those known to American jurors are at a particular disadvantage. Moreover, it is

often difficult to prove a negative, as claimants must. (Yet, the jury was able to precisely differentiate those cases warranting forfeiture from those in which money was not subject to forfeiture. The diligence and determination of this American jury to be fair to foreign claimants is striking.)

A claimant that surmounts all hurdles and wins a jury verdict is entitled to receive its money promptly. In the instant case the hearing on whether the government had probable cause to seize the funds were not completed until nine months after the funds were seized. The trial was completed more than a year later. Few businesses can function without access to a substantial portion of their assets for that period of time. The claimants who met their

burden at trial of proving the legitimate source of their funds will have their money returned to them without any other compensation except interest earned, less court fees for supervision of the funds. They will have been without the use of their money for the two years since the funds were seized.

III. APPLICATION OF LAW TO FACTS

A. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Under Rule 50(b) of the Federal Rules of Civil Procedure a judge may disregard the jury's verdict only

> if the evidence, viewed in the light most favorable to the non-movants without considering credibility or weight, reasonably permits only a conclusion in the movants' favor.

Sirota v. Solitron Devices, Inc., 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Lous

Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The court should disregard a jury determination for which "there is no legally sufficient evidentiary basis enabling a reasonable jury to make it." 1991 Adv. Committee Notes to Rule 50(b).

In the course of the two-month trial in the instant case, the jury conscientiously listened to the evidence, took notes, and was extremely careful in the course of its decision-making. The jurors were provided with notebooks with dividers to enable them to address separately each claimant and each claim in the trial. The fact that the jury decided in favor of the government on some claims and in favor of the claimants in others belies any suggestion that their deliberations were not thorough. The evidence, briefly reviewed below,

supported the jury's verdict as to each claimant and each claim.

The following claimants sought the following amounts at trial: CONFECCIONES ZUNY LTDA, $440,000; CREACIONES IVONNE LTDA, $32,000; CREACIONES KAREN LTDA, $756,625; INCOLCO LTDA, $1,000,000; MANUFACTURAS DE MODAS LTDA, $400,000; TOTE EXPORT MANUFACTURAS LTDA, $392,860; VALERY FASHIONS LTDA, $448,418; ABUCHAIBE HNOS., $200,000 and $54,070; COMERCIAL ESTRELLA LTDA, $301,500; CONFECCIONES Y TEJIDOS NACIONALES LTDA, $549,990; CREACIONES VIVIANA LTDA, $125,025, $50,030, and $50,000; INDUSTRIAS MARATHON LTDA, $805,194.49; MANUFACTURAS INTERNACIONALES LTDA, $599,970; MANUFACTURERA DEL ATLANTICO LTDA, $492,810; SIRACUSA TRADING CO. and the HEIRS OF HERIBERTO

CASTRO-MESA, $3,400,000; MANUFACTURAS J.D. LTDA, $98,991; ORGANIZACION J.D. LTDA, $98,990 and $98,800; and CONFECCIONES ELIZABETH LTDA, $40,000.

The evidence of the claimants indicated -- if believed -- that massive shipments of manufactured garments were sent abroad from modern plants in Colombia to Panama in order to earn dollars legitimately. There they were handed over to ship captains who toured the Caribbean islands trading the garments for goats and local produce, losing some, having some stolen, and with the remainder disposed of through charity in Colombia and other non-traceable channels. Although possible, these and other implausible stories told by claimants' witnesses would justify the jury's skeptical view of the claimants'

somewhat inconsistent positions.

The evidence of drug tainting was overwhelming. A flurry of wire transfer activity followed the arrests of the Londono associates Jurado, Garcia, and Mahecha in Luxembourg. There was a sophisticated and complicated series of connections and financial transactions between the various drug-connected players in this case. After a description of one technique described at trial, the evidence will be more generally summarized.

1. INDUSTRIAS MARATHON LTDA

When the Londono associates were arrested in Luxembourg, authorities seized telephone books, documents, and bank records. Garcia had a business card with a bank account number written on the

reverse. The same number had appeared on one of the faxes intercepted by the Luxembourg Surété Publique from Jurado's apartment in Luxembourg. The account was at a bank in Guernsey, Channel Islands.

Investigation by the Surété revealed that Garcia earlier had arranged for $805,194.49 to be sent to the Guernsey bank from Panama by a Panamanian shell corporation nominally headed by Heriberto Castro-Mesa and Esperanza Rodriguez de Castro, Londono's parents-in-law. Funds from the account in Panama which was the source of the $805,194.49 had been used in 1987 to open other accounts in the name of Heriberto Castro-Mesa and Esperanza Rodriguez de Castro. The other funds in the Panamanian account were forfeited after the Luxembourg trial of Jurado and Garcia.

When $805,194.49 was electronically transferred to Colombian claimant Industrias Marathon via a New York bank immediately after the arrests in Luxembourg, the money was seized. The testimony of the Analyst Holmes, the C.P.A. Kostoglian, and the former Londono associates confirmed the illicit source of the funds. The evidence was sufficient for a jury to conclude that the funds were the traceable proceeds of illegal drug money-laundering and narcotics transactions, and that claimants were aware of the drug-related sources of the funds.

2. OTHER FORFEITED CLAIMS

At the Luxembourg arrests several pocket address books were seized. Garcia's book contained the telephone

numbers for representatives of the claimants, linking them with a known money-changer and drug money-launderer, Jairo Carrascal. In Colombia authorities seized a telephone book from another known drug money-launderer, Roberto Juri. Many of the numbers in the two telephone books, seized continents apart, were identical.

Witnesses also testified that the bank accounts and records of the corporate claimants were inconsistent with the conduct of a legitimate clothing manufacturing enterprise. The evidence at trial conclusively established that the corporate records and bank statements revealed a pattern of huge same day deposits and debits reflective of drug money-laundering practices.

Special Customs Agent Steven Haywood

of the United States Customs Service set up a phony bank account and entered the drug money-laundering business as a purported money-changer. Periodically he received large amounts of cash driven in cars from the New York City area, originating in cocaine sales there. While conducting his covert money-laundering investigative operation, Haywood was instructed by a money-changer to send electronic funds transfers to corporations including claimants. Special DEA Agent Robert Michaelis testified that an account at Banco Cafetero in Panama was used by Londono and his associates to store and move narcotics proceeds. The account was identified only by a number. Money was transferred from the Banco Cafetero account to the claimants. Claimants also

received electronic funds transfers from several of the identified shell corporations set up by Londono's associates.

Claimants objecting to the verdicts of forfeiture have made no showing that the evidence "reasonably permits only a conclusion in the[ir] favor." Sirota v. Solitron Devices, Inc. 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Louis Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The verdicts as to each claimant and each claim were supported by the evidence. The motions for judgment notwithstanding the verdict are denied.

3. MANUFACTURAS J.D. LTDA -- $98,991
ORGANIZACION J.D. LTDA -- $98,990 and $98,800

The jury at trial determined that

claimants Manufacturas J.D. and Organizacion J.D had met their burden of proving that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

4. CONFECCIONES ELIZABETH LTDA - $40,000

The jury at trial determined that even though the funds claimed by confecciones Elizabeth were the traceable proceeds of illegal drug activity and drug money-laundering transactions, claimant had met its burden of proving that it was an innocent owner. It did not "know," through its books and records

or corporate representatives and agents, that the funds in question constituted the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

B. MOTION FOR A NEW TRIAL

The court has the power to grant a new trial, even where the verdict was justifiable, to prevent a miscarriage of justice. Under Rule 59(a) of the Federal Rules of Civil Procedure, a court may grant a new trial if

> the jury has reached a seriously erroneous result, or . . . the verdict is a "miscarriage of justice" i.e. . . . the verdict is against the great weight of the evidence . . .

Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983). The standard is difficult to meet. The claimants have raised a number of arguments in support of their motion for a new trial. Each will be addressed in turn.

1. SHIFTING BURDEN OF PROOF

At the hearing on the post-trial motions claimants posed the question whether the shifting of the burdens of proof in forfeiture cases in constitutional. Were a constitutional violation found, a new trial or dismissal would be required. No such remedy is necessary.

The Second Circuit in United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986), discussed the probable

cause requirements where moneys in bank accounts are at stake:

> In almost all cases, once the Government has shown probable cause to believe that someone has sold drugs and deposited the proceeds of a drug sale into a bank account, there will be probable cause to believe that the bank account contains "traceable proceeds" of the sale. . . . The burden will then be on the claimant to demonstrate that no portions of the account . . . are "traceable proceeds" of the drug sale.

Id. at 1160. The court went on to discuss the concerns about burden-shifting and the difficulty of proof:

> No doubt uncertainty caused by the fungibility of money will make it difficult and in may cases impossible for claimants to satisfy this burden. But it is precisely the function of burden of proof rules to determine which party loses where evidence is lacking or at best ambiguous. Under the Congressional scheme, the risk of uncertainty in determining the traceability of proceeds of drug sales is placed squarely on the claimant, once probable cause has been established.

Id.

The district court is bound by the Second Circuit's determination that Congress' allocation of the burdens of proof in forfeiture proceedings is constitutional. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972 (1991). The court wrote: "we find nothing unconstitutional in congress's allocation of the burdens of proof in forfeiture cases . . . ." Id. at 814; United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982) (same), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984); United States v. $250,000 in United

States Currency, 808 F.2d 895, 901 (1st Cir. 1987) (shifting burdens does not violate fifth amendment); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989) ("We . . . find the burden-shifting aspect of the statute constitutional."); United States v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65, 66 (9th Cir. 1976) (per curiam) (imposition of burden of proof on the claimant is not unconstitutional); Bramble v. Richardson, 498 F.2d 968, 970 n.2 (10th Cir.) ("[Claimant]'s conception of the forfeiture proceedings is not entirely accurate. . . . [T]he burden merely shifts to [him] once probable cause has been established."), cert. denied sub nom. Bramble v. Saxbe, 419 U.S. 1069 (1974); see also United States v. Blackwood, 47 F.2d 849, 851-52 (1st Cir.)

(imposing burden of proof on the government was error where probable cause had already been found), cert. denied, 284 U.S. 627 (1931). The motion for a new trial on this ground must be denied.

2. SEPARATE TRIALS

Claimants argue that they were prejudiced by the court's refusal to grant separate trials. The claimants contend that the jury was unable to keep the evidence separated as to each claimant and ascribed to some claimants evidence of drug tainting related solely to other claimants. Claimants move for a new trial on this ground.

The court first addressed the issue of prejudice from joinder in allocating peremptory challenges among the claimants at the outset of the trial. The jury

panel was not large enough to permit each claimant to independently exercise a full set of peremptory challenges. Many potential jurors did not feel they could be fair in a drug-related case. Ultimately a jury representative of the community was selected.

Sharing of peremptory challenges was proper because the interests of the claimants were not adverse to one another. Accord Doralee Estates Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 723 (2d Cir. 1977) (plaintiff allowed his three challenges but defendant and third-party defendant required to exercise one each and three jointly); Carey v. Lykes Bros. S.S. Co., 455 F.2d 1192, 1194 (5th Cir. 1972) (district court's sharing procedure "expressly authorized by Section 1870"); Moore v. South African

Marine Corp., 469 F.2d 280, 281 (5th Cir. 1972) (no error to require shared challenges even where party objects).

Separate trials were not required because the claimants' interests were not hostile. All claimants had the same burden against the government and all wanted the return of their funds. Although some evidence of the background drug money-laundering scheme overlapped, each claimant presented its own evidence to meet its own burden of proving that the funds it claimed were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. The fact that some claimants were required to prove both the legitimate source of funds and that they were innocent owners, whereas others attempted to prove only that they were

innocent owners, does not change this conclusion.

Severance would have severely burdened the court and government. Accord City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 549-50 (E.D.N.Y. 1987). Separate trials would have been a waste of judicial resources and would have caused extreme inconvenience to witnesses. The trial was prolonged even in its combined form because of the necessity for translation of the bulk of the testimony and the need to instruct the jury on technical financial matters. Denial of the motion to sever in such circumstances is proper. Cf. United States v. Marietta Mfg. Co., 53 F.R.D. 390, 400 (S.D.W. Va 1971) (motion for separate trial denied to avoid protracted delay and duplication of

effort). Whether to order separate trials is within the discretion of the trial court. Brown v. Advantage Eng'g, 732 F. Supp. 1163, 1170 (N.D. Ga. 1990); Keister v. Dow Chem. Co., 723 F. Supp. 117, 120 (E.D. Ark. 1989).

That the jury was not confused or claimants prejudiced is reflected in the discriminating verdicts, finding some claims valid and other invalid. The precise questions of the jurors during deliberations, their note-taking, and their calm attentiveness all belied confusion or prejudice. A joint trial was proper.

3. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Claimants charge that the court erred in permitting the government to introduce into evidence wire transfer

advises obtained in violation of the Omnibus Crime Control and Safe Street Act, 18 U.S.C § 2510 et seq. (1988 & Supp. III 1991), the federal wiretap statute. The statute prohibits the interception of "electronic communications." which includes a variety of technologies such as electronic funds transfers and electronic communications in storage.

The court has already addressed the claimants' arguments, in ManufacturasInternational Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). The complaint was dismissed on the ground that the federal wiretap statute does not apply to the seizure of electronic funds transfers by banks following government

and court instructions. See 1992 WL 96212, at *10; 1968 U.S. Code Cong. & Admin. News 2112, 2153; United States v. Herring, 933 F.2d 932, 934-35 (11th Cir. 1991) (amendments did not change statute's focus on surveillance and eavesdropping).

The wiretap statute does not apply because in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. §981(b) (1988 & Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991) ("relation-back" doctrine); See, e.g., United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on government's title relates back to date of crime), aff'd sub nom. United States

v. Schiferli, 895 F.2d 987 (4th Cir. 1990). As the Consolidated Bank Cases court wrote:

> The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with communications irrelevant.

1992 WL 96212, at *10.

Finally, claimants' unsupported assertion that the introduction into evidence of the wire transfer advises violated the fourth amendment is groundless. The motion for a new trial on this ground is denied.

4. NEW YORK BANKS

Claimants contend that the court erred in not overruling the protective order granted by the magistrate judge.

The magistrate judge prohibited the claimants from taking depositions or issuing subpoenas to employees of the intermediary New York banks which seized the wire transfers. In their deposition and subpoena requests claimants sought information about the instructions given to the banks by the United States Attorneys.

In Consolidated Bank Cases, __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992), the court disposed of claimants' concerns about the seizure of the subject funds by the New York banks. The court dismissed the action for failure to state a claim, noting that the banks were not

> rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court.

Id. at *15. Since electronic funds

transfers are affected rapidly, the government must be permitted to act without any interference by the banks. The banks normally should not make any independent determinations.

Where banks act as agents of the court they are protected. Id.; cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (same where bank executes writ of attachment). Claimants require nothing further from the employees of the bank. The protective order was proper.

5. UNITED STATES ATTORNEYS

Claimants complain that the court granted the government's motion in limine barring claimants from calling the United States Attorneys as witnesses at trial. The court has twice addressed claimants'

desire to elicit information from the United States Attorneys.

During discovery claimants sought to depose the United States Attorneys involved in this case, but the magistrate judge granted the government's motion for a protective order. The magistrate judge determined that the taking of opposing counsel's deposition is permissible only where (1) there is no other way to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

The protective order was granted in part because the information could be obtained elsewhere and in part because it is undesirable for United States

Attorneys to appear as witnesses at trial to defend statements made at deposition. The magistrate judge's decision was proper. The court dismissed an action filed by claimants against the United States Attorneys who had instructed the banks to seize the funds. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision). The claimants have offered nothing to alter the conclusions reached by the magistrate judge and the district judge. There was no relevant information to be obtained from the United States Attorneys who acted ethically and responsibly in connection with the seizure of wire transfers at the New York correspondent banks.

6. EXPERT TESTIMONY

Claimants objected to the court's

permitting DEA Intelligence Analyst Holmes and Special DEA Agent Michaelis to testify and to state opinions. Agent Michaelis testified on the basis of the evidence and known drug money transfer techniques that several of the electronic wire transfers wee intended for receipt by Jose Santa Cruz Londono. There was also testimony about the existence of an overall drug money-laundering scheme. This testimony was based on the evidence at trial as well as the expertise of the witness.

Given the complex nature of the evidence, the jury was aided by this expert testimony. See Fed. R. Evid. 702, 703. Its probative force heavily outweighed any prejudice. Id. Rule 403. DEA agents may testify as experts on illegal activities such as narcotics

dealing. United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 111 S. Ct. 179, cert. denied sub nom. Estrada Ruis v.United States, 494 U.S. 1068 (1990). Sophisticated drug money-laundering activities, such as those relied upon by claimants, are a proper subject for expert testimony. The methods of moving of currency internationally and the maintaining of corporate and bank records are not subjects easily understood without some expert assistance. The jury was repeatedly admonished not to substitute the expert's opinions for the jury's own conclusions about the veracity of the testimony and the meaning of the records which constituted the bulk of the evidence.

The court has broad discretion in

determining the qualifications of and need for expert witnesses. Hamling v. United States, 418 U.S. 87, 108 (1974). Claimants have not demonstrated that the court's determination was "manifestly erroneous." Salem v. United States Lines Co., 370 U.S. 31, 35 (1962). The witnesses were properly qualified and their limited testimony useful and non-prejudicial.

7. BEST EVIDENCE RULE

Claimants' argue that the government's expert accounting witness should not have been permitted to testify as to capital investment, accounting and banking practices, and estimated profits from business enterprises. The testimony was amply supported by, and required by, the huge amount of financial documentary

evidence.

Claimants argue that this testimony violates the best evidence rule. The best evidence rule refers to and governs the admission of the contents of "a writing, recording, or photograph." See Fed. R. Evid. art X. It has no application to the testimony of an expert witness summarizing and analyzing evidence already in the record. Cf. id. Rule 1006. The objection is groundless.

C. MOTION TO RELEASE RES

Claimants Manufacturas J.D and Organizacion J.D., which sustained their burden at trial of proving that their claimed funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions, move for the immediate release of their funds.

The government seeks a delay in the release of funds on the grounds that Johnny Daccarett, the owner and legal representative of claimant corporations Manufacturas J.D. and Organizacion J.D., is a fugitive.

The government contends that Johnny Daccarett has a prior conviction for trafficking in approximately two tons of marijuana. There is also an outstanding indictment against him in New Jersey for tax violations. It is the government's position that since Daccarett is a fugitive, the claimant corporations he represents should be barred under the disentitlement doctrine from receiving funds they rightfully claim.

The disentitlement doctrine provides that one who is a fugitive from justice cannot seek relief from the judicial

system the authority of which he is flouting by fleeing prosecution. If a party is avoiding prosecution for a crime, he cannot lay claim to money or property in a related civil proceeding. See, e.g., United States v. 760 SW 1st Street, Miami, Fla., 702 F. Supp. 575, 577 (W.D.N.C. 1989) ("[since he] fits the definition of a fugitive, . . . he may not demand to use the resources of this Court in a civil action to claim property").

1. FUGITIVE STATUS

The first question is whether Daccarett can be considered a fugitive. Claimants Manufacturas J.D. and Organizacion J.D. contend that there has been no showing that Daccarett was ever in this jurisdiction, let alone a showing

that he fled to avoid prosecution.

A person can be a fugitive even when he does not "flee" but is simply found outside the jurisdiction. See Jhirad v. Ferrandina, 536 F.2d 478, 483-84 (2d Cir.) (no meaningful distinction between those leave the jurisdiction and those who have already left and decide not to return), cert. denied, 429 U.S. 833 (1976); United States v. 218 Panther Street, Newfoundland, Pa., 745 F. Supp. 118, 121 (E.D.N.Y. 1990) ("An individual who learns of charges against him while legally outside the jurisdiction 'constructively flees' by deciding not to return."), aff'd sub nom. United States v. Eng, 951 F.2d 461 (2d Cir. 1991). To be considered a fugitive, the individual need not flee or "constructively flee" with the intent of avoiding a pending or

intended prosecution. United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) ("whether [he] left before or after . . . indictment is irrelevant"; nor need there even be an official indictment handed down). Even where an individual is in prison elsewhere or it is otherwise impossible for him to leave, he can be considered a fugitive. See, e.g., United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) ("One may flee even though confined in prison in another jurisdiction.").

It is critical to show that the person sought in the criminal proceeding knows he is wanted by the authorities and then fails to submit to arrest. See United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 644 (1st Cir. 1988) ("Perhaps most importantly, there

is no evidence that [the claimant] had notice of this proceeding . . . ."); United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323-24 (9th Cir. 1978) (intent to avoid prosecution, making an individual a fugitive, can be inferred where he knows the authorities want him and he fails to surrender); United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) (noting that individual was "aware of both the indictment and the civil forfeiture action"); United States v. Schreiber, 535 F.Supp. 1359, 1363 (S.D.N.Y. 1982) (individual who left the country in 1964 became a fugitive in 1966 when he learned he was under indictment and made no effort to return).

We assume that Daccarett was aware of the criminal charges pending against

him since the government brought this fact to claimants' attention, and, through them, to their representative Daccarett. There was no legal barrier to his return to the United States. He should be, and is, treated as a fugitive.

2. "DISENTITLEMENT" DOCTRINE

An individual who is a fugitive can be barred by the disentitlement doctrine from receiving seized funds. By extension, the government's position is that the claimant corporations which Daccarett represented should also be prevented from receiving the funds they claim. A brief explanation of the disentitlement doctrine and its development is necessary to understand the parties' positions.

The first statement of the

disentitlement doctrine was in the context of a criminal proceeding, where the Supreme Court declined to adjudicate an appeal from the merits of a conviction where the appellant was a fugitive. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). Courts extended this doctrine to bar a fugitive from participating in a civil proceeding based on a prior criminal proceeding. In Conforte v. Commissioner, 692 F.2d 587, 589-90 (9th Cir. 1982), the Ninth Circuit held that a fugitive could not contest the assessment of tax liabilities in a civil proceeding where he was a fugitive from the related criminal tax proceeding.

Finally, in 1985 the Ninth Circuit held that the disentitlement doctrine should apply in civil forfeiture proceedings. United States v. $129,374

in United States Currency, 769 F.2d 583, 587-88 (9th Cir. 1985), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986). The doctrine bars not only the fugitive but also the fugitive's successor from contesting the forfeiture while at the same time resisting prosecution in a related criminal action. Id. at 587. No case has been found addressing the question now posed: whether a corporation represented by a fugitive should also be barred by the disentitlement doctrine from claiming funds in a forfeiture proceeding.

A trial court has discretion in applying the disentitlement doctrine. United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984) ("this matter resides within the sound discretion of the Court"). The reasons for exercising

discretion in the claimants' favor are overwhelming. First, in this case no credible evidence has been submitted demonstrating that the "fugitive" controls any claimant or that he will receive the benefit of proceeds returned to a claimant. Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case. On the contrary, the attorney for claimants Manufacturas J.D. and Organizacion J.D. asserts that Daccarett has been willing to be deposed in person at an embassy in Colombia or by telephone but the government has refused.

Finally, the civil forfeiture is independent of the criminal case pending against Daccarett. In disentitlement cases the criminal indictment, prosecution, or potential prosecution

should be related to the forfeiture proceeding. United States v. $129,374 in United States Currency, 769 F.2d 583, 588 (9th Cir. 1985) ("[the] criminal conviction and the property involved . . . are integrally related parts of the same unlawful drug dealing scheme"), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986); Schuster v. United States, 765 F.2d 1047, 1049 (11th Cir. 1985) ("no question that the civil case . . . is related to the criminal case"); United States v. $45,940 in United States Currency, 739 F.2d 792, 794 (2d Cir. 1984) (question is whether his fugitive "status bars him from defending the related forfeiture proceeding") (emphasis added). In this All Funds case, the indictment at issue is in a different district and it is for tax

violations. The government has not suggested that the tax violations are related to the drug money-laundering activities underlying this All Funds action.

It is the claimant corporations, Manufacturas J.D. and Organizacion J.D., which prevailed at trial -- not Johnny Daccarett. The government has shown no persuasive reason to bar the corporate claimants from receiving their funds. The jury found that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. Daccarett's status as a fugitive is irrelevant. The motion to release the res must be granted.

D. MOTION TO STAY JUDGMENT AND WAIVE SUPERSEDEAS BOND

Claimants Abuchaibe Hnos., Comercial

Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda move for an order staying execution of judgment pending appeal without posting a supersedeas bond.

Since the funds are in the possession of the court and gathering interest, there will be no prejudice to the government from a stay of execution of judgment. Nor is there any risk that the property will be removed:

> Unlike the typical case where the defendant ship stealthily absconds from port and leaves the plaintiff with no res from which to collect, here the defendant res is in the possession of the United States and thus in no danger of disappearing. . . . Having prevailed below, the government, if it wins on appeal is assured of execution regardless of whether [claimant] files a bond or stays execution of the judgment.

United States v. $95,945.18 in United States Currency, 913 F.2d 1106, 1109 (4th Cir. 1990); see also United States v. One Lot of $25,721 in Currency, 938 F.2d 1417, 1419 (1st Cir. 1991) (supersedeas bond not required).

IV. CONCLUSION

The jury's verdict of forfeiture of eighteen of the twenty-two amounts seized is fully supported by the evidence. The motions for judgment notwithstanding the verdict are denied. No errors warrant granting the motions for a new trial. The amounts claimed by Manufacturas J.D. and Organizacion J.D. are ordered released in seven days from the date of this memorandum; the delay will permit application for a stay in the Court of Appeals. Execution of the judgment of

forfeiture of funds claimed by Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda is stayed during the pendency of the appeal. No supersedeas bond is required.

SO ORDERED.

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
FINAL JUDGMENT -against-	AND ORDER
ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL., Defendants.	cv-90-2510

The issues in the above-captioned action were tried before a jury in the Eastern District of New York from March 9, 1992 through May 8, 1992; and

Nineteen claimants and the plaintiff UNITED STATES OF AMERICA presented witnesses and documentary evidence; and

The jury considered the issues in this action and, after due deliberation, rendered a unanimous verdict on May 8, 1992 forfeiting the following funds to plaintiff UNITED STATES OF AMERICA after deciding that the following fifteen claimants had failed to meet their burden of proving that the eighteen claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions or that they were innocent owners:

1. Claimant: CONFECCIONES ZUNY LTDA
   Amount: $440,000
2. Claimant: CREACIONES IVONNE LTDA
   Amount: $32,000
3. Claimant: CREACIONES KAREN LTDA
   Amount: $756,625
4. Claimant: INCOLCO LTDA
   Amount: $1,000,000
5. Claimant: MANUFACTURAS DE MODAS LTDA
   Amount: $400,000
6. Claimant: TOTE EXPORT MANUFACTURAS LTDA
   Amount: $392,860
7. Claimant: VALERY FASHIONS LTDA
   Amount: $448,418
8. Claimant: ABUCHAIBE HNOS.
   Amount #1: $200,000
   #2: $54,070
9. Claimant: COMERCIAL ESTRELLA LTDA
   Amount: $301,500
10. Claimant: CONFECCIONES Y TEJIDOS NACIONALES LTDA
    Amount: $549,990
11. Claimant: CREACIONES VIVIANA LTDA
    Amount #1: $125,025
    #2: $50,033
    #3: $50,000
12. Claimant: INDUSTRIAS MARATHON LTDA
    Amount: $805,194.49
13. Claimant: MANUFACTURAS INTERNACIONALES LTDA
    Amount: $599,970

14. Claimant: MANUFACTURERA DEL ATLANTICO LTDA
Amount: $492,810
15. Claimant: SIRACUSA TRADING Co. and the HEIRS OF HERIBERTO CASTRO-MESA
Amount: $3,400,000; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sum of $98,991 to claimant MANUFACTURAS J.D. LTDA after deciding that the claimant had met its burden of proving that the claimed amount was not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sums of $98,990 and $98,800 to claimant ORGANIZACION J.D. LTDA after deciding that the claimant had met its burden of proving that the two claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

They jury rendered a unanimous verdict on May 8, 1992 returning the sum of $40,000 to claimant CONFECCIONES ELIZABETH LTDA after deciding that the claimant had met its burden of proving that it was an innocent owner of the claimed amount.

ORDERED AND ADJUDGED that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court,

less fees, is hereby condemned and forfeited to the use and benefit of the UNITED STATES of AMERICA; and that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court, less fees, be turned over to the UNITED STATES OF AMERICA in seven days and that the Clerk of the Court issue a check in the total amount payable to "United States Marshals Service" and then forward that check to United States Attorney, ATTN: Arthur P. Hui, Esq., One Pierrepont Plaza, 11th Floor, Brooklyn, NY 11201; this order is stayed pending completion of appeals.

ORDERED AND ADJUDGED that the sum of $98,991 plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant MANUFACTURAS J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Manufacturas J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso 2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sums of $98,990 and $98,800, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant ORGANIZACION J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Organizacion J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso

2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sum of $40,000, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant CONFECCIONES ELIZABETH LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Davis Markel & Edwards - Trust Account" and then forward that check to M. Blair Sibley, Esq., Davis Markel & Edwards, 66 West Flagler Street, Suite 1100, Miami, Florida 33130.

ORDERED, ADJUDGED, AND DECREED that pursuant to Rules 54(b) and 58 of the Federal Rules of Procedure the Clerk of the Court enter final judgment.

SO ORDERED.

_____

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 1264, 1265---August Term 1992

(Argued: April 2, 1993
Decided: Sep. 10 1993)

Docket Nos. 92-6229, 92-6259

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPRESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No. 044000804961700114433 held at the MERRILL LYNCH BANK 1 Columbus;PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF

NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO CAMPO; ANA MILENA SANTA CRUZ;RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTDA.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC. BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTEÑA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLOMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS.LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON

LTDA; MANUFACTURERAS DE MODA LTDA; INCOLCO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants,

EMPRESA NELSON GOMEZ,
O. "FASTER" and COSTAFAST,

Counter-Claimants.

BEFORE:

OAKES, PIERCE, and PRATT,
Circuit Judges.

Appeal in a civil forfeiture case from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, denying motions for judgment notwithstanding the verdict and for a new trial, releasing amounts claimed by two claimants, and forfeiting the funds claimed by all other claimants.

Affirmed.

ISIDORO RODRIGUEZ, Barranquilla, Colombia S.A., for Defendants-Appellants Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.

MONTGOMERY BLAIR SIBLEY, Miami,FL (Davis, Markel & Edwards, of counsel), for Defendants-Appellants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Tote Export Manufacturas Ltda., and Creaciones Ivonne.

ARTHUR P. HUI, Assistant United States Attorney, Brooklyn, NY (Mary Jo White, United States Attorney for the Eastern District of New York, of Counsel), for Appellee.

PRATT, Circuit Judge:

INTRODUCTION

Illegal sales of controlled substances generate billions of dollars in revenue every year. Narcotics traffickers continually seek to make their ille-

gal income appear legitimate. When international drug conglomerates attempt to move their profits beyond the reach of law enforcement authorities, their monies are frequently funneled through financial institutions in the United States. Money laundering has become so sophisticated

> that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic fund transfers.

House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986). The arteries of international banking systems have become the "lifeblood" of the international drug trade. See 132 Cong. Rec. S9938, S9986 (daily ed. July 31, 1986); President's Comm'n on Organized Crime,

The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 4-8 (1984).

In an attempt to stop the flow of illicit money back to drug suppliers, congress in the past decade has passed several acts aimed at drug-trafficking and money-laundering activities. See, e.g., International Narcotics Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914, codified at 12 U.S.C. §§ 635, 22 U.S.C. §§ 2151, 2291; Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, codified at 18 U.S.C. §§ 1956, 1957. While a money-laundering conviction results in automatic forfeiture to the government of any property involved in the offense, see 18 U.S.C. § 982(a), the government can also institute civil forfeiture

proceedings without first obtaining a conviction. See 18 U.S.C. §981. This case tests the effectiveness of civil forfeiture as a tool for seizing and forfeiting proceeds of narcotics trafficking as they pass through our banking system.

FACTS AND BACKGROUND

There are two groups of claimants: the "Atlantico Claimants", consisting of Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.; and the "Barranquilla Claimants", consisting of

Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Ltda., Tote Export Manufacturas Ltda., and Creaciones Ivonne Ltda. Both sets of claimants appeal from a final judgement and other rulings of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, following a jury verdict that forfeited to the government more than $10,000,000, pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881. United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984 (E.D.N.Y. 1992) (All Funds) (technical amendment to opinion filed on Sept. 14, 1992).

The forfeitures arose out of an international effort to impede the drug-

trafficking and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz-Londoño, which allegedly imports approximately 3000 kilograms of cocaine a month into the United States. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts.

When a customer wants to commence an EFT, its bank sends a message to the transfer system's central computer, indicating the amount of money to be transferred, the sending bank, the receiving bank, and the intended benefi-

ciary. The Central Computer then adjusts the account balances of the sending and receiving banks and generates a printout of a debit ticket at the sending bank and a credit ticket at the receiving bank. After the receiving bank gets the credit ticket, it notifies the beneficiary of the transfer. If the originating bank and the destination bank belong to the same wire transfer system, then they are the only sending and receiving banks, and the transfer can be completed in one transaction. However, ff the originating bank and the destination bank are not members of the same wire transfer system, which is often the case with international transfers, it is necessary to transfer the funds by a series of transactions through one or more intermediary banks.

The seizures at issue were precipitated by the arrests of three Santacruz-Londoño associates in Luxembourg on June 28 and 29, 1990. These men had opened hundreds of bank accounts throughout Europe and deposited large sums of money in them for the Cali cartel. Anticipating that these arrests would trigger an effort by the cartel to move its monies to Colombia before they could be confiscated, Luxembourg law-enforcement authorities requested the assistance of several countries to freeze monies related to the cartel. During July and August 1990, a flurry of electronic funds transfers from the suspect accounts ensued, resulting in the seizure of $ 30 million in Europe, $ 16 million in Panama, and $ 12 million in the United States.

The $ 12 million seized in the United States was the aggregate of dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with Panamanian and Colombian banks, including Banco Atlantico, Manufacturers Hanover, The Bank of New York, and Merrill Lynch. After receiving the subject EFTs, the intermediary banks were supposed to credit the accounts of designated correspondent Colombian banks; the Colombian banks were then supposed to notify the beneficiaries that the funds were available. However, through both oral orders and a series of eight arrest warrants in rem, government agents instructed the intermediary banks in New York to attach "all funds" on deposit in the names of various individuals and entities con-

nected with Santacruz-Londoño and "all related entities and individuals", and to inform the agents about all transfers that were destined for a third-party beneficiary in Colombia. The intermediary banks complied with the agents' directions; they initially froze the seized funds and later transferred them to the clerk of the court who now holds them pending the outcome of this appeal.

Each successive warrant included more names. If the government agents seized funds destined for a corporation not yet named in the complaint, it would amend the complaint to add that corporation's name soon after the seizure. By the seventh amended complaint and its accompanying warrant, all but one of the claimants in this action were explicitly named. The Drug Enforcement Agency

("DEA") also subpoenaed from the intermediary banks financial records of any accounts related to the entities named in the complaint.

The ten Atlantico Claimants and seven Barranquilla Claimants (collectively "claimants"), purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to approximately $ 6.5 million of the seized funds, denied all of the allegations in the in rem complaint, and claimed that their monies had been derived from legitimate sales of clothing. The Atlantico Claimants also brought two counterclaims, seeking damages for alleged violations of the fourth and fifth amendments, of the Electronic Communications Privacy Act, see 18 U.S.C. §§ 2510-2520 and §§

2701-2710, of the Right to Financial Privacy Act, see 12 U.S.C. §§ 3401-3422, of the Federal Tort Claims Act, see 28 U.S.C. §§ 2671-2680, and of the civil forfeiture statutes, see 21 U.S.C. § 881; 18 U.S.C. § 981. Their counter-claims were dismissed before trial.

In a related action, claimants sued the intermediary banks in the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, for loss of the use of their funds and violation of various federal and state statutes. Judge Weinstein granted summary judgment for the banks, holding that they could not be held liable for following government orders respecting claimed government funds. Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., 792

F.Supp. 180, 196 (E.D.N.Y. 1992) (Consolidated Bank Cases).

In still another related action, claimants sued the United States attorneys who had ordered the banks to seize the funds; Judge Weinstein dismissed that suit for failure to state a claim. Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

On May 13, 1991, after an ex parte, in camera hearing, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. §881(i) and 18 U.S.C. § 981(g). Two weeks later, Judge Weinstein held a

three-day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable. Claimants' motion to vacate the probable-cause finding and to suppress evidence obtained by the DEA subpoenas were denied on February 19, 1992.

On March 9, 1992, a two-month jury trial began. The government presented extensive evidence, including corporate and banking records from all over the world and the testimony of witnesses familiar with the Cali cartel's operations. That evidence linked Santacruz-Londono's drug proceeds to various Panamanian and Colombian shell corporations. The claimants tried to show that the monies were the legitimate profits from sales of clothing made in Colombia and

Panama. They claimed that massive shipments of clothing were handed over to ship captains who toured the Caribbean islands, trading some for produce, livestock, and currency, losing some in transit, having some stolen, and finally disposing of the remainder of the shipments through charitable means. All Funds, 801 F. Supp. at 992.

The jury found that eighteen of the twenty-two amounts seized were forfeitable. For the remaining amounts, the jury found that those claimed by Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. were not traceable proceeds of illegal money-laundering and narcotics transactions, and that Confecciones Elizabeth Ltda. was an innocent owner. After the trial, those claimants who received an adverse jury decision moved

for judgment notwithstanding the verdict and for a new trial; both motions were denied. Judge Weinstein ordered the release of the amounts found not to be forfeitable and stayed execution of the forfeitures pending this appeal. Most of the claimants have appealed. However, Siracusa Trading Company, a claimant whose funds were seized from Merrill Lynch's office in Columbus, Ohio, and Confecciones Elizabeth Ltda. the claimant found to be an innocent owner, did not appeal.

Comercial Samora, one of the Atlantico Claimants, has also appealed, although it did not participate in the civil forfeiture trial. On the first day of the trial, Comercial Samora withdrew its verified claim and all other papers that it had filed in the proceed-

ings. Judge Weinstein consequently entered a separate judgment of forfeiture on June 5, 1992, against the $124,000 originally claimed by Comercial Samora; in his August 5, 1992, opinion, Comercial Samora is noticeably absent from the list of claimants at trial. All Funds, 801 F. Supp. at 992. Nevertheless, Comercial Samora has appealed with the rest of the Atlantico Claimants from the August 5, 1992, judgment; it did not file a separate brief on appeal, and no separate arguments were made on its behalf.

The claimants, including the two whose funds were found not to be the proceeds of illegal drug trafficking, raise numerous issues on appeal, challenging the validity of the seizures and pleadings, various aspects of the trial,

dismissal of the counterclaims, and the district court's allowance of the execution of an IRS levy. For the reasons stated below, we affirm.

DISCUSSION

The conceptual underpinnings of civil forfeiture can be traced back to ancient Roman and medieval English law, both of which made objects used to violate the law subject to forfeiture to the sovereign. See United States v. 785 St. Nicholas Ave., 983 F. 2d 396, 401-02 (2d Cir.) (St. Nicholas Ave.) (discussing historical origins of forfeiture), cert. denied, 61 U.S.L.W. 3772 (1993). Our laws providing for official seizure of property used in criminal activity perpetuate the legal fiction that "property used in violation of law was itself

the wrongdoer that must be held to account for the harms it had caused." United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1135 (1993) (Buena Vista Ave.). Because the property, or res, is considered the wrongdoer, it is regarded as the actual party to in rem forfeiture proceedings. Id.

Civil forfeiture has recently gained new life as an instrument of federal law enforcement, particularly as a weapon in the "war on drugs". As part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, congress strengthened civil forfeiture as a means of confiscating illegal substances and the means by which they are manufactured and distributed. Pub. L. No 91-513, 84 Stat. 1276 (1970), codified at 21 U.S.C. §§ 881-896. In 1978 congress amended

the act to authorize the seizure and forfeiture of the proceeds of illegal drug transactions as well. The statute provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] all proceeds traceable to such an exchange." Pub. L. No. 95-633, 92 Stat. 3777 (1978), codified at 21 U.S.C. § 881(a) (6) (emphasis added).

Now "one of the most potent weapons in the judicial armamentarium", see United States v. 384-390 West Broadway, 964 F. 2d 1244, 1248 (1st Cir. 1992) (West Broadway) (discussing widespread use of in rem proceedings against drug offenders, civil forfeiture has become a

favored method for imposing significant economic sanctions against narcotics traffickers. However, the ease with which the government can seize property and the potential hardships caused to innocent owners who seek to recover their property once the government has seized it have elicited concern from courts and commentators alike. Given that the reach of civil forfeiture is constantly expanding to new realms -- in this case, to electronic funds transfers between banks -- the courts must ensure that constitutional and procedural safeguards remain intact.

A. Seizures.

There are three ways the government can institute civil forfeiture in rem proceedings under 21 U.S.C. § 881. First, it can follow the process set

forth in the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules"). 21 U.S.C. § 881(b). Second, it can obtain a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure, which requires a finding of probable cause ex parte by a judicial officer. Fed. R. Crim. P. 41(c). Third, it can seize property without judicial process "when the Attorney General has probable cause to believe the property is subject to civil forfeiture." 21 U.S.C. § 881(b)(4). See St. Nicholas Ave., 983 F. 2d at 402 (discussing three options); United States v. 4492 S. Livonia Rd., 889 F 2d 1258, 1262-63 (2d Cir. 1989) (Livonia Rd.) (same). In this case, the government used the first and third options, neither of which requires pre-

seizure judicial approval. See United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 941 F. 2d 1428, 1432 n.5 (11th Cir. 1991).

Before analyzing the validity of the seizures here, we note that even when the initial seizure is found to be illegal, the seized property can still be forfeited. See United States v. $37,780 in United States Currency, 920 F.2d 159, 163 (2d Cir. 1990) (holding that "illegal seizure of property does not immunize that property from forfeiture"). This is because seizure and forfeiture are two distinct events. While both require the government to have probable cause, the consequences of lack of probable cause may differ depending on the event. Absence of probable cause at the time of the seizure may

result in the suppression of evidence in later proceedings, but the defendant property itself cannot be suppressed from the forfeiture action. See id. In contrast, a failure to establish probable cause on the forfeiture issue will preclude forfeiture of the property altogether. See discussion Part B, infra.

1. Compliance with Supplemental Rules.

The seizures of at least nine of the EFTs followed the process prescribed by the Supplemental Rules. Under the Supplemental Rules, the government begins by filing a verified complaint in the district where the seizure (arrest of the property) will occur. Supp. Rule C(2). Ordinarily, the court must review the papers authorizing an arrest warrant

in rem. See Supp. Rule C(3). However, in actions for "forfeitures for federal statutory violations", as in this case, "the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the * * * property without requiring a certification of exigent circumstances." Id. (emphasis added).

Claimants argue that the in rem complaints failed to comply with the particularity requirements for pleadings set forth in the Supplemental Rules. Two rules address the level of particularity required in forfeiture complaints. Rule C(2) states that the complaint "shall describe with reasonable particularity the property that is the subject of the action." Rule E(2)-(a) specifies that the complaint must

"state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

These standards are more stringent than the general pleading requirements set forth in the federal rules of civil procedure, see Livonia Rd., 889 F.2d at 1266, and implicit accommodation to the drastic nature of the civil forfeiture remedy. West Broadway, 964 F.2d at 1248; see also 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3242 (1973). The particularity-of-pleading requirements in forfeiture cases provide a "way of ensuring that the government does not seize and hold,

for a substantial period of time, property to which, in reality, it has no legitimate claim." Livonia Rd., 889 F.2d at 1266 (quoting United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 638 (1st Cir. 1988)).

The complaint does not have to meet the ultimate trial burden of showing probable cause for forfeiture; it simply needs to establish a "reasonable belief that the government can show probable cause for forfeiture at trial." United States v. U.S. Currency, in the Amount of $150,660.00, 980 F.2d 1200, 1204-05 (8th Cir.1992). In other words, the complaint need not allege facts sufficient to show that specific property is tainted, but facts sufficient to support a reasonable belief that the government can demonstrate probable cause for find-

ing the property tainted. Id. at 1205; see also United States v. One Parcel of Real Property, 921 F.2d 370, 376 (1st Cir. 1990); Pole No. 3172, Hopkinton, 852 F.2d at 640.

Claimants contend that the in rem complaints did not contain a particular description of the funds to be seized or sufficient allegations to link the funds to illegal drug activity. More specifically, they argue that the use of the phrase "all related entities and individuals" in the complaint unduly broadened the scope of the warrant and impermissibly gave the government "full discretion" to seize whatever property it desired.

Whether a forfeiture complaint is sufficiently particularized to reach a given piece of property is an issue of

law subject to plenary review. West Broadway, 964 F.2d at 1248; U.S. Currency, in the Amount of $150,660.00, 980 F.2d at 1204. In determining whether a complaint satisfies rule E(2) (a), a court may also consider supporting affidavits that may cure a lack of particularity in the complaint itself. Livonia Rd., 889 F.2d at 1266.

If the complaint had described the subject properties as simply "all funds on deposit in any accounts maintained * * * in the name [] of * * * Jose Santacruz-Londoño" and "all related entities and individuals", without more, then the claimants' argument might be well taken. However, given that the names of the claimants were gradually added by the successive amendments to the complaint, we will discuss in this

section here only those seizures that were preceded by a complaint and arrest warrant that explicitly named the intended beneficiary. All other seizures, that is, those made before the complaint and arrest warrant specifically mentioned the EFT's intended beneficiary, will be treated as warrantless seizures, which are discussed in the next section. This approach will obviate any dependence on the "related parties" language in the warrant.

The successive complaints name as defendants "all funds on deposit" in certain banks "in the names of "various named claimants, "including, but not limited to" specific account numbers. The complaints allege that Santacruz-Londoño "caused substantial sums of monies" from narcotics trafficking and

money laundering to be transferred through accounts, "including the defendant accounts", and credited to accounts, including those of various named claimants. In addition, an international Letter Rogatory from the Eastern District of New York is incorporated by reference and attached to the complaint. It describes in greater detail the government's investigation since 1979 of Santacruz-Londoño, the arrests of the three cartel members in Luxembourg, and the use of Colombian shell corporations for disguising the illegal nature of the narcotics proceeds.

By naming both the intermediary banks through which the funds were to be transferred and the intended beneficiaries of the EFTs, the complaint

described the subject property with "reasonable particularity". See Supp. Rule C(2). By recounting Santacruz-Londoño's activities and methods of funneling his narcotics proceeds through various New York banks for ultimate deposit in Colombian bank accounts, the complaint states "the circumstances from which the claim arises" with sufficient particularity for the claimants to "commence an investigation of the facts and frame a responsive pleading". See Supp. Rule E(2).

In this case, the claimants filed verified claims and responsive pleadings to the Seventh Amended Complaint in rem without moving for a more definite statement. We conclude that the complaints and their accompanying warrants of arrest complied with the pleading

requirements of the Supplemental Rules.

2. Seizure without Judicial Process.

At least eleven of the amounts were seized either without a warrant or prior to the issuance of a warrant that explicitly named the intended beneficiary of the EFT. We will analyze all such seizures as warrantless seizures. When the "Attorney General has probable cause to believe" that property is subject to forfeiture under § 881, the government is authorized to seize the property without judicial process. 21 U.S.C. § 881 (b) (4).

Therefore, the question is whether the assistant United States attorneys, as representatives of the Attorney General, had "probable cause to believe"

that the EFTs were "subject to civil forfeiture under [§ 881]" at the time they requested the intermediary banks to attach the subject EFTs. Clearly they did. This is not a case in which the government "stumbled" into a seizure without any prior information about the subject property. See, e.g., $37,780 in United States Currency, 920 F.2d at 163 (holding that DEA agents at airport lacked probable cause to seize money from claimant's attaché case at time of seizure). Instead, they knew that Santacruz-Londoño, who had already been indicted in this country for various narcotics and money-laundering violations, would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his "businesses" in Colom-

bia.

There are two additional statutory requirements for seizures without judicial process. First, after seizure the government must institute forfeiture proceedings "promptly". 21 U.S.C. § 881 (b). Second, the proceedings should follow applicable customs laws, 21 U.S.C. § 881 (d), which are found at 19 U.S.C. §§ 1595a to 1615. In this case, the government satisfied both requirements. It filed a civil forfeiture complaint within days of each warrantless seizure, and the resulting forfeiture proceeding followed the applicable customs laws.

3. Fourth-Amendment Concerns.

Claimants argue that their fourth-amendment rights were violated in three instances: (1) when EFTs were seized

without a warrant; (2) when EFTs were seized pursuant to a rule C(3) warrant without a prior judicial determination of probable cause; and (3) when the government gained access to their financial records from the intermediary banks without a warrant.

The Fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, * * * and particularly describing the place to be searched[] and the * * * things to be seized." U.S. Const. amend. IV.

a. The Warrant Requirement.

We first address the fourth amendment's applicability to warrantless sei-

zures made pursuant to 21 U.S.C. § 881 (b)(4). While some circuits have held that the fourth amendment's warrant requirement is inapplicable in light of the statute's plain language allowing seizure without judicial process, see, e.g., United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir.) (only need probable cause, not a warrant, because property subject to forfeiture is contraband), cert. denied, 454 U.S. 818 (1981); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983) (warrantless seizure of automobile pursuant to § 881 (b)(4) does not offend fourth amendment); United States v. Valdes, 876 F.2d 1554, 1557 (11th Cir. 1989) (warrantless seizure of automobiles used to facilitate drug transaction did not violate

fourth amendment), this circuit requires seizures made pursuant to § 881 (b)(4) to comport with the fourth amendment, see, e.g., United States v. LaSanta, 978 F.2d 1300, 1304-05 (2nd. Cir. 1992) (warrantless seizure of vehicle must meet a recognized exception to fourth amendment); cf. In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307, 311 (1st Cir. 1988) (fourth amendment applies to forfeiture seizures); United States v. Linn, 880 F.2d 209, 215 (9th Cir. 1989) (same).

Therefore, to be valid the warrantless seizures must fall within one of the recognized exceptions to the fourth amendment's warrant requirement. LaSanta, 978 F.2d at 1305. The government argues that the exigent-circum-

stances exception justifies any warrantless seizures made in this case. They claim that EFTs can be "completed in a matter of minutes or hours", and therefore present "greater exigencies than the seizure of a conveyance[] or perhaps[] any other kind of property". Because the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here. The seizures made pursuant to § 881 (b)(4), therefore, did not violate the fourth amendment.

b. The Probable-Cause Requirement.

With respect to the EFT seizures that were made pursuant to an in rem warrant, claimants argue that because the warrants were issued "forthwith" by

a "clerk of the court", without a preceding probable-cause determination, see Supp. Rule C(3), they failed to satisfy the fourth amendment's probable-cause requirement. Several courts have held the Supplemental Rules' summary-warrant procedures unconstitutional. See, e.g., United States v. Life Ins. Co., 647 F. Supp.732, 742 (W.D.N.C. 1986) ("without a determination of probable cause by a qualified judicial officer, [§] 881(b) violates the Warrants clause of the Fourth Amendment"); United States v. $128,035 in U.S. Currency, 628 F. Supp. 668, 672-73 (S.D. Ohio) ("procedure authorized by § 881(b) runs afoul of minimal Fourth Amendment procedural requirements"), appeal dismissed, 806 F.2d 262 (6th Cir. 1986). Other courts have held that in rem warrants are not true "war-

rants" subject to fourth-amendment strictures. See, e.g., United States v. TWP 17 R 4, 970 F.2d 984, 987-89 (1st. Cir. 1992) (posting an in rem warrant on property not a seizure for purposes of fourth amendment); United States v. Turner, 933 F.2d 240, 245 (4th Cir. 1991) (in rem warrant more analogous to a summons, not a "warrant" within the meaning of fourth amendment).

In this circuit, just as warrantless seizures under § 881 (b)(4) must satisfy the fourth amendment, so must seizures made with warrants pursuant to the Supplemental Rules. Therefore, although the plain language of § 881(b) allows for the issuance of a warrant without probable cause, see, e.g., One 1978 Mercedes Benz, 711 F.2d at 1302 ("If [Attorney General] lacks probable

cause * * * he may file a verified complaint pursuant to the maritime rules and effect the seizure pursuant to that process"), the fourth amendment mandates the existence of probable cause at the time of seizure. $37,780 in U.S. Currency, 920 F.2d at 163 (fourth amendment requires government to have probable cause at the time it seizes money). However, the government need not obtain a judicial determination of probable cause prior to seizure. While "absent an `extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified", the Supreme Court has held that "such an extraordinary situation exists when the government seizes items subject to forfeiture."

United States v. Eight Thousand Eight Hundred & Fifty Dollars, 461 U.S. 555, 562 n.12 (1983) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 633 (1974)).

Therefore, the government must have probable cause at the time the clerk issues the warrant in rem, but need not demonstrate that it had probable cause at the time of the seizure unless a claimant challenges the validity of the seizure. As discussed in section 2 above, the government had probable cause to believe that the defendant funds were the proceeds of illegal narcotics trafficking at the time they were seized.

c. Privacy Interests in Financial Records.

Finally, claimants argue that the DEA's subpoenas of all the financial records at the intermediary banks relating to the EFTs violated their fourth-amendment rights. The government contends that the claimants do not have any protectable fourth-amendment interest in the bank records at issue, because they are not customers of the intermediary banks. We agree. Claimants hold accounts with Colombian banks, which have accounts with the intermediary banks. 'The claimants' relationship with the intermediary banks is too remote to afford the claimants any legitimate expectation of privacy in information about EFTs being received by the intermediary banks.

Even if claimants had their own accounts with the intermediary banks,

information regarding those accounts would not be protected by the fourth amendment. In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that a bank customer had no "protected Fourth Amendment interest" in the copies of checks and other records the bank retained. Id. at 440. The Court stated that the fourth amendment "`at the most guards against * * * too much indefiniteness or breadth in the things required to be "particularly described," if * * * the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.'" Id. at 445-46 (quoting Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946)).

The Court reinforced Miller in S.E.C. v. Jerry T. O'Brien, Inc., 467

U.S. 735 (1984), where the Securities and Exchange commission had subpoenaed an individual's financial records from two broker-dealer firms. The court held that the individual had no fourth-amendment claim, because once he gave his financial information to someone else, "even on the understanding that the communication [wa]s confidential," he could not object if the third party conveyed that information to law-enforcement authorities. Jerry T. O'Brien, Inc., 467 U.S. at 743 (citing Miller, 425 U.S. at 443). The Court also noted that a "target" of an investigation has no right to notice of subpoenas issued to third parties. Id. at 742-43.

Because the DEA was authorized to demand information regarding the EFTs

from the intermediary banks and the materials requested were relevant to their investigation, we conclude that no fourth-amendment violation occurred here.

4. Right to Financial Privacy Act.

The Right to Financial Privacy Act ("RFPA") prohibits "financial institutions" from giving the government access to "the information contained in the financial records of any customer" absent a search warrant, subpoena, court order, formal written request, or customer authorization. 12 U.S.C. § 3402. Congress enacted the RFPA in part as a response to Miller, 425 U.S. 435. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9306; see also United States v. Mann, 829 F.2d 849, 851 (9th

Cir. 1987); Duncan v. Belcher, 813 F.2d 1335, 1337 (4th Cir. 1987). However, the "most salient feature of the Act is the narrow scope of the entitlements it creates", because congress wanted to "minimize[] the risk that customers' objections to subpoenas will delay or frustrate agency investigations." Jerry T. O'Brien, Inc., 467 U.S. at 745-46.

If the government gains access to financial records through a warrant, subpoena, court order, or written request, it must give the financial institution's "customer" simultaneous notice of the access. see 12 U.S.C. § 3405(2) (administrative subpoena and summons); 12 U.S.C. § 3406(b) (search warrant); 12 U.S.C. § 3407(2) (Judicial subpoena); 12 U.S.C. § 3408(4)(A) (formal written request). In this case,

however, the DEA's subpoenas "for all financial records" of "any and all accounts related to" the claimants explicitly instructed the intermediary banks not to disclose the existence of their requests.

The Barranquilla Claimants contend that since they were not given notice of the government's access to the financial records, the evidence obtained from the subpoenas should have been suppressed at trial. The Atlantico Claimants argue that Judge Weinstein improperly dismissed their counterclaim alleging that the government and the intermediary banks were liable under the RFPA for disclosing information about the EFTs.

In response to both arguments, the government maintains that the claimants are not protected by the RFPA, because

they are not "customers" of the intermediary banks. Under the RFPA, a "customer" is "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution * * * in relation to an account maintained in the person's name." 12 U.S.C. § 3401(5) (emphasis added). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4). Thus, the act is limited to individual customers and small partnerships; corporations are not protected. see, e.g., Pittsburgh National Bank v. United States, 771 F.2d 73 (3d Cir. 1985); Spa Flying Service, Inc. v. United States, 724 F.2d 95 (8th Cir. 1984) (per curiam); see also Jerry T. O'Brien, Inc., 467 U.S. at 745 (RFPA "carefully

limits the kinds of customers to whom it applies").

The government notes that the claimants are all corporations and therefore are not protected by the RFPA. It is unclear from the record on appeal whether the claimants are partnerships or corporations. If they are corporations, as they alleged in the district court, then they are not protected by the RFPA. If they are partnerships, as they now claim on appeal, we would need to remand so that the district court could obtain proof to that effect; however, a remand is not necessary, because there are alternate grounds that preclude the application of the RFPA.

Even if the claimants are in fact small partnerships rather than corporations, the government contends that they

still would not be protected by the RFPA, because they do not hold accounts in their names at the banks as required by 12 U.S.C. § 3401(5). The funds were not seized from accounts held in the various claimants' names, but were the proceeds of wire transfers that were designated to be credited to the accounts of Colombian banks maintained at the intermediary banks.

In response, claimants argue that once the EFTs were intercepted by the intermediary banks, the frozen funds were held by those banks under the claimants' names. At that point, claimants contend, they had "accounts" in their names at the banks. While claimants present a creative interpretation of an "account", the seized funds were being held by the banks until the forfeiture

trial at the request of the government, not the claimants. The RFPA is meant to protect those who maintain accounts in their names at financial institutions. Duncan, 813 F.2d at 1338 (definition of customer turns on "whether the individual maintains the financial account in his or her name only"); Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex, 1988). Because the funds were being held in custody at the banks pursuant to an arrest warrant, we conclude that the claimants never maintained accounts in their names at the intermediary banks.

Finally, the government contends that even if there had been a statutory violation of the RFPA, exclusion of the financial records from trial would not have been a permissible remedy. Because

the RFPA states that civil penalties are "the only authorized" remedy for its violation, see 12 U.S.C. § 3417(d), it would be inappropriate for the courts to imply a suppression remedy as well. United States v. Frazin, 780 F.2d 1461, 1466 (9th Cir.) (only remedy under RFPA is provided in statute), cert. denied, 479 U.S. 844 (1986); see also United States v. Thompson, 936 F.2d 1249, 1252 (11th Cir. 1991) (courts should not imply a suppression remedy unless statute specifically refers to exclusionary rule), cert. denied, 112 S. Ct. 975 (1992).

In short on this point, because the RFPA does not protect the claimants, the Atlantico Claimants' counterclaim was properly dismissed, and the financial records were properly admitted at trial.

5. Authorization for DEA Subpoenas.

The Barranquilla Claimants also claim that the financial records should have been suppressed at trial because the DEA did not follow proper administrative procedures for issuing the subpoenas. Specifically, they argue that John Maltz, whose rubberstamped signature is on the subpoenas, did not have the authority to issue the subpoenas, and that even if he did, he failed to personally determine whether the subpoenas were "relevant or material" to investigations conducted under the Comprehensive Drug Abuse Prevention and Control Act of 1970, as required by 21 U.S.C. § 876 (a). See United States v. Hossbach, 518 F. Supp. 759, 765-66 (E.D. Pa. 1980).

Section 876 (a) authorizes the At-

torney General to issue subpoenas for "relevant or material" information; the Attorney General may in turn delegate this subpoenas power to any DEA officer or employee. See 21 U.S.C. § 878(a)(2); see also United States v. Mountain States Tel. & Tel. Co., 516 F. Supp. 225, 229 n.2 (D. Wyo. 1981). The relevant federal regulation authorizes, among others, all Special Agents-in-Charge and Assistant Special Agents-in-Charge to issue subpoenas. 28 C.F.R. § 0.104, App. to Subpart R, Sec. 4(a).

Maltz was the Associate Special Agent-in-Charge of the New York Drug Enforcement Task Force, a position not specifically included in the regulation's list. The Barranquilla claimants argue that any subpoena issued by Maltz was therefore unauthorized. As an Asso-

ciate Special Agent-in-Charge, however, Maltz supervises nine Assistant Special Agents-in-Charge, agents who are specifically authorized to issue subpoenas under the regulation. During Maltz's eight years as an Associate Special Agent-in-Charge, internal New York Drug Enforcement Task Force procedures have required all administrative subpoenas to bear his signature. Since Maltz has the same authority as an Assistant Special Agent-in-Charge, plus additional supervisory responsibilities, we agree with Judge Weinstein that Maltz's exercise of the subpoenas power was proper. See Hossbach, 518 F. Supp. at 765-66 (upholding validity of subpoenas issued by either agents-in-charge or acting agents-in-charge).

The Barranquilla Claimants further

argue that Maltz never "issued" the subpoenas because they simply bear his rubber-stamped signature; nor is there any indication that Maltz personally determined that the information sought was "relevant or material" to an investigation. Judge Weinstein called the DEA's procedures in this respect "dangerous" and recommended that the government review its system for issuing DEA administrative subpoenas, but he denied the claimants' motion to suppress. We find no error in his ruling. Nothing in the statute, regulations, or caselaw requires a handwritten, rather than a rubber-stamped, signature on the subpoena. More significantly, even if the initial subpoenas were defective, the financial records at issue would have been introduced at trial anyway, because

they were procured through other means as well. Both the government and the claimants served the intermediary banks with deposition and trial subpoenas for the same documents.

6. Electronic Communications Privacy Act.

Claimants argue that the EFTs were protected under the Electronic Communications Privacy Act of 1986 ("ECPA"), which amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, often called the wiretap act. 18 U.S.C. §§ 2510-20. The ECPA updated the wiretap act to add prohibitions against the interception of "electronic communications" to the already existing prohibitions against interceptions of oral and wire communications. See 18 U.S.C. § 2510(12). The Barranquilla Claimants

maintain that the district court should have suppressed evidence of the EFTs since they were seized in violation of the ECPA. The Atlantico Claimants contend that the complaint should have been dismissed because the in rem warrants did not satisfy the ECPA, and that for the same reason the district court erred in dismissing their counterclaim under the ECPA.

First, we must determine whether the ECPA is applicable to this case. The statute is directed at regulating surveillance activities. However, the ECPA's legislative history indicates that congress intended to protect "funds transfers among financial institutions". S. Rep. No. 99-541, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3562. There are no cases that

apply the ECPA to an electronic funds transfer between banks or to a seizure of funds after the transfer is complete. For purposes of this appeal, however, we assume that the ECPA may apply to EFTs. Before considering the statute's applicability to these transfers, we first take up other issues raised by the district court.

Judge Weinstein addressed the ECPA at length in Consolidated Bank Cases, 792 F. Supp at 190-93, and briefly in All Funds, 801 F. Supp. at 995-96. Relying on the "relation-back" doctrine, see 18 U.S.C. § 981(b); 21 U.S.C. § 881(h), he held that the ECPA was inapplicable because "in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed." All Funds, 801 F. Supp.

at 995-96. Because ownership was transferred instantly at the moment of criminality, he found that the government "reasonably viewed the funds as its own" at the time of seizure. Id. at 996 (quoting Consolidated Bank Cases, 792 F. Supp. at 192).

However, since Judge Weinstein's decision, the Supreme Court has clarified the parameters of the relation-back doctrine in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). There, the government initiated a civil forfeiture proceeding against land allegedly purchased with proceeds of illegal drug trafficking. The claimant, who had purchased the land with money her friend had given to her, maintained that she was an innocent owner because she did not know the money was traceable to

narcotics transactions. The district court held that, under the relation-back doctrine, title to the land vested in the government at the moment the illegal drug transaction proceeds were used to pay the purchase price. Therefore, because the claimant had purchased the land after the acts giving rise to the forfeiture had occurred, she had never owned the land.

The Supreme Court disagreed, holding that the government could not "profit from the common-law doctrine of relation-back until it has obtained a judgment of forfeiture." Id. at 1137. Otherwise, it would be impossible to launch an innocent-owner defense, which was specifically provided for at 21 U.S.C. § 881(a)(7). The relation-back doctrine is one of "retroactive

vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation." Id. at 1138 (Scalia, J., concurring).

In light of Buena Vista, Judge Weinstein's application of the relation-back doctrine was incorrect. Because the government cannot contend that it owns the defendant properties until a judgment of forfeiture is entered against them, we must examine the ECPA's applicability to the EFTs.

The ECPA prohibits interceptions of electronic communications, see 18 U.S.C. § 2511(1), but no "device" was used to obtain the information as contemplated by the ECPA. The statute defines "intercept" as

> the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any

> electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (emphasis added). Liability under the ECPA is therefore predicated on the use of a "device". See United States v. Turk, 526 F.2d 654, 658 (5th Cir.) (act requires "contemporaneous acquisition of the communication through the use of the device"), cert. denied, 429 U.S. 823 (1976). Because the government did not use any type of "device" to obtain the EFTs and information, no "interception" occurred.

The district court, therefore properly rejected all of the claimants' arguments under the ECPA.

7. Wire Transfer as a Res.

Claimants argue that EFTs are not seizable properties for purposes of the civil forfeiture statutes because they are merely electronic communications.

They claim that an EFT is not a direct transfer of funds, but rather a series of contractual obligations to pay. Furthermore, they define an EFT as "an intangible property, which not only cannot be stopped once transmitted, but the Intermediary Bank upon accepting it cannot alter from the instructions contained therein." Finally, they claim that only after a transmission is complete and the communication is accepted and received by the beneficiary does it become a seizable res.

Section 881 of Title 21 provides for the seizure of "moneys, negotiable instruments, securities, or other things of value * * * all proceeds traceable" to narcotics transactions. 21 U.S.C. § 881(6). Similarly, 18 U.S.C. § 981(a)(1)(A) provides for the seizure of

"any property, real or personal, involved in a transaction or attempted transaction * * * or any property traceable to such property."

The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds

moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

Our decision in United States v. Banco Cafetero Panama made it cleat that a bank credit is a seizable res. 797 F.2d 1154, 1158 (2d Cir. 1986) (bank credit is "clearly 'traceable proceeds' under the forfeiture statute") (Banco Cafetero). We also held that moving "traceable proceeds" from bank to bank would not insulate them from forfeiture.

"Since commingled assets, traceable to drug proceeds, are forfeitable, the bank's money remains vulnerable to forfeiture when the money is moved into its account at a second bank or into a second bank's account at a third bank." Id. at 1161; see also Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, reprinted in 1978 U.S.C.C.A.N. 9518, 9522 ("proceeds * * * involved in intervening legitimate transactions, or otherwise changed in form * * * still * * * subject to forfeiture" as long as "traceable connection to an illegal transaction in controlled substances exist[s]").

Therefore, an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res

under the forfeiture statutes.

B. Probable Cause.

Unless a claimant challenges the validity of the seizure, as in a motion to suppress, the government is not called upon to demonstrate probable cause until trial of the forfeiture action, see $37,780 in United States Currency, 920 F.2d at 163 (applying Banco Cafetero, 797 F.2d at 1162), or perhaps on a summary judgment motion. Although the government succeeded in two pretrial probable-cause hearings, one before Magistrate Judge Chrein and one before Judge Weinstein, and in a full-blown jury trial, claimants still contend that the government failed to meet its burden of proving probable cause. Both for seizures made under in rem warrants and for warrantless seizures

under § 881, the government bears the initial burden of establishing probable cause for instituting the forfeiture proceeding, see 21 U.S.C. § 881(d) (incorporating customs procedures); 19 U.S.C. § 1615 (customs laws), that is, "probable cause to believe that the properties are the fruits of illegal drug activity". See United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road, 916 F.2d 808, 811-12 (2d Cir. 1990) (Whites Hill), cert. denied, 498 U.S. 1091 (1991).

Since 1986 our caselaw has consistently relied on Banco Cafetero for the proposition that, to establish probable cause, the government must have "reasonable grounds" to believe the property is subject to forfeiture, and that these grounds must rise above the level of

"mere suspicion". 797 F.2d at 1160. See, e.g., United States v. 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990) (Black Ledge Drive); Livonia Rd., 889 F.2d at 1267; United States v. One 1986 Mercedes Benz, 846 F.2d 2, 4 (2d Cir. 1988) (per curiam). However, we seem to have recently articulated apparently inconsistent formulations of how far above "mere suspicion" the probable-cause burden lies. While in United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993) (citation omitted), we stated that the "government must have reasonable grounds to believe that 'a substantial connection exists between the money to be forfeited and the exchange of a controlled substance'", in St. Nicholas Ave., 983 F.2d at 403, we said that "[t]here need

not be a substantial connection between the drug activities and the property in question, but only a nexus between them." We therefore take this opportunity to resolve this apparent contradiction.

As authority for the "substantial connection" standard, the $31,990 in U.S. Currency decision quotes United States v. United States Currency in the Amount of $228,536.00, 895 F.2d 908, 916 (2d Cir.), cert. denied, 495 U.S. 958 (1990), which in turn relies on Banco Cafetero, 797 F.2d at 1160. However, Banco Cafetero does not state that a "substantial connection" must be shown, only that the government must have "probable cause to connect the property with narcotics activity". 797 F.2d at 1160 (emphasis added).

Moreover, on several occasions we have specifically declined to adopt a "substantial connection" standard. See United States v. 38 Whalers Cove Drive, 954 F.2d 29, 33 (2d Cir.) (Whalers Cove), cert. denied, 113 S. Ct. 55 (1992); Livonia Rd., 889 F.2d at 1269; United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 423 (2d Cir. 1977). Our decisions in $31,990 in U.S. Currency, 982 F.2d 851, and United States Currency in the Amount of $228,536.00, 895 F.2d 908, are the only second circuit cases to the contrary. Examining the facts of those two cases, we note that application of the lower "nexus" standard, rather than the "substantial connection" standard, would not have affected their results.

In $31,990 in U.S. Currency, the

government failed to establish probable cause to forfeit money seized from the trunk of a cab. 982 F.2d at 854-56. The claimant, who had been a cab fare they day before the seizure, said he had inadvertently left his money in the cab. The government's evidence consisted of the large amount of cash seized, the manner in which it was packaged, the cab driver's story regarding who owned the money, parallels between the cab's itinerary and that of a drug courier, and the cab driver's possession of half a gram of cocaine. Id. at 853-55. None of the people involved had ever been linked to any criminal activity. Not only did the government fail to show a "substantial connection" between the claimant's property and narcotics, we held that the evidence demonstrated "no

more than a suspicion" that the money was the proceeds of drug trafficking. Id. at 856. It goes without saying that evidence failing to amount to more than "mere suspicion" is incapable of establishing a "nexus".

In United States Currency in the Amount of $228,536.00, the evidence supporting probable cause included tape recordings of numerous conversations implicating the claimant in drug trafficking, tax records, and eyewitness testimony detailing the claimant's possession, processing, and sales of large amounts of cocaine. 895 F.2d at 911. Application of the "nexus" standard there would have had no effect, since the government's case satisfied the higher "substantial connection" standard.

Under all these circumstances, we are satisfied that the weight of authority in the second circuit indicates that the government must demonstrate only a "nexus between the seized property and illegal drug activity, not a "substantial connection". See St. Nicholas Ave., 983 F.2d at 403; United States v. One 1987 Jeep, 972 F.2d 472, 476 (2d Cir. 1992); Whalers Cove, 954 F.2d at 33; United States v. One 1974 Cadillac, 575 F.2d 344, 345 (2d Cir. 1978) (per curiam); One 1974 Cadillac Eldorado Sedan, 548 F.2d at 423.

To show that nexus when the res is a bank account, the government must establish that there is probable cause to believe the funds represent proceeds traceable to drug transactions, see St. Nicholas Ave., 983 F.2d at 403; it is

not required to link the monies to any one particular transaction. See Livonia Rd., 889 F.2d at 1269 (citing Banco Cafetero, 797 F.2d at 1160). The government must establish "reasonable grounds", based on more than "mere suspicion", that the funds are subject to forfeiture. Banco Cafetero, 797 F.2d at 1160; Livonia Rd., 889 F.2d at 1267. Curiously, this standard of proof can be less stringent than the typical "prima facie proof". Banco Cafetero, 797 F.2d at 1160. A finding of probable cause may be based on hearsay, even hearsay from confidential informants, see Livonia Rd., 889 F.2d at 1267, or circumstantial evidence, see St. Nicholas Ave, 983 F.2d at 405, particularly in cases involving bank accounts, money, or other fungible assets. See id. ("only proof

demonstrating probable cause is likely to be circumstantial, revealing unexplained wealth in conjunction with evidence of drug trafficking").

Claimants argue that the evidence presented here was illegally seized and therefore provided an impermissible basis for a finding of probable cause. As discussed above, however, there is no basis for suppressing the evidence derived from the seizures under either the fourth amendment or federal statutes.

The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause determination rests on

information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result. At this point in the development of forfeiture law, any change in the balance of this unique procedural system must come either from the Supreme Court or from congress.

Claimants also assert that even if the evidence was properly admitted at trial, the government failed to demonstrate "reasonable grounds" for the forfeiture of their funds. Under 21 U.S.C. § 881, probable-cause determinations are "made by the trial court's exercise of its judgment in light of all the circum-

stances." St. Nicholas Ave., 983 F.2d at 405. The government's case included bank records from around the world; documents seized by the Colombian National Police from Cali, Colombia; and testimony of former members of the Cali Cartel, numerous DEA agents, a Luxembourg police officer, a member of the Internal Revenue Service's criminal investigations division, a United States customs official, and a certified public accountant who reviewed the claimants' business records.

While the claimants argue that the government failed to submit evidence that the "sources" and "destinations" of the seized funds were connected to narcotics activities, the extensive evidence regarding the Santacruz-Londono organization as a whole was more than

sufficient to link the defendant funds to illegal drug trafficking. Each one of the claimants was linked to Santacruz-Londono through the testimony of at least one witness. We hold that the district court properly determined that the government had met its burden of establishing probable cause for the forfeitures.

C. Shifting Evidentiary Burden.

After the government has established probable cause, the burden shifts to the claimant to "demonstrate by a preponderance of the evidence that the factual predicates necessary to show probable cause have not been met or to show claimant[']s lack of knowledge or consent to drug related activities." St. Nicholas Ave., 983 F.2d at 403; see Black Ledge Drive, 897 F.2d at 102;

Livonia Rd., 889 F.2d at 1267 ("claimant must prove either that the property was not used unlawfully * * * or that the illegal use was without the claimant's knowledge or consent"); Banco Cafetero, 797 F.2d at 1160 (claimant bears "ultimate burden"). if the res is a bank account, the claimant bears the burden of proving that the account does not contain proceeds traceable to drug transactions, but rather represents legitimate funds. St. Nicholas Ave., 983 F.2d at 403.

Not only does the burden shift to the claimant opposing forfeiture, but the claimant's burden is heavier than the government's. While the government, to establish a prima facie case for forfeiture, need only demonstrate "reasonable grounds", the owner of the

seized property must prove that the defendant property is legitimate "by a preponderance of the evidence", a more stringent standard. United States v. 303 W. 116th St., 901 F.2d 288, 291 (2d Cir. 1990).

Judge Weinstein observed that the structure of the civil forfeiture statutes is "inherently unfair to claimants". All Funds, 801 F. Supp. at 991. While we also might question the wisdom of forcing the owner of the seized property to prove the property is "innocent", rather than making the government prove the property id "guilty", the constitutionality of congress's allocation of the burdens of proof in forfeiture cases has been upheld. See Whites Hill Road, 916 F.2d at 814. We therefore stress the need for courts to en-

sure that what little due process is provided for in the statutory scheme is preserved in practice. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal- Civil Law Distinction, 42 Hastings L. Rev. 1325 (1991) (urging attention to civil law due process implications of current forfeiture practices); See also United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.").

As the jury's verdict indicates,

Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. successfully proved that their monies were not connected to drug activity. In addition, the jury found that Confecciones Elizabeth was and innocent owner. The remaining claimants were unable to show by a preponderance of the evidence that their monies were legitimate. Given that "the evidence of drug tainting was overwhelming" and that the claimants presented "implausible stories" and "inconsistent positions", see All funds, 801 F. Supp. at 992, we find that the remaining eighteen amounts were properly forfeited.

D. Other District Court Rulings.

1. Sanctioning Counsel.

During discovery, the Barranquilla claimants requested admissions from the government regarding numerous histori-

cal, social, and cultural aspects of Colombia. Because Chief Magistrate Judge Chrein questioned the relevance of these requests and felt they were frivolous, he directed both parties to brief the issue of appropriate sanctions for Barranquilla Claimants' Counsel after the trial. No sanctions were imposed during trial, and ultimately Judge Weinstein denied the government's post-trial motion for sanctions.

On appeal, the Barranquilla Claimants assert that their counsel was "chilled" during the trial by the threat of possible sanctions in violation of their due process rights. The record, however, reveals no evidence that counsel for the Barranquilla Claimants was "chilled" in any way. In the absence of prejudice to the Barranquilla Claimants

from Chief Magistrate Judge Chrein's actions, we find no violation of their due process rights.

2. Permitting Expert-Witness Testimony.

The Barranquilla Claimants claim that they were prejudiced by DEA Agent Michaelis's testimony on the subject of money laundering, because it constituted surprise expert testimony. Michaelis was listed on the government's witness list prior to trial, but not as an expert. When Michaelis took the stand, Judge Weinstein qualified him as an expert and allowed him to testify about Santacruz-Londono's overall money-laundering scheme and techniques. The Barranquilla Claimants argue that they were "substantially prejudiced" by this unexpected expert testimony.

Under the Federal Rules of Evidence, expert Witnesses may testify if their "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Qualified DEA agents who testify as fact witnesses may also give expert opinion testimony about the methods of drug operations. See United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 498 U.S. 866 (1990); United States v. Diaz, 878 F.2d 608, 617 (2d Cir.), cert. denied. 493 U.S. 993 (1989). A decision to allow expert testimony is within the broad discretion of the trial judge and "is to be sustained on appeal unless manifestly erroneous." United States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985), cert. denied, 475 U.S. 1141

(1986) (citation omitted). Furthermore, a district court's decision to permit a witness who was not listed in the pre-trial order to testify will be upheld absent a clear abuse of discretion. Dunlap- McCuller v. Riese Org., 980 F.2d 153, 158 (2d Cir. 1992).

A district court judge must frequently make close discretionary calls regarding the admission of evidence in civil forfeiture proceedings. Indeed, the Supreme Court has recently signalled its willingness, at least with respect to expert testimony, to require more active supervision by the district court. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796-98 (1993). Because in civil forfeiture proceedings the government is far more favored by the rules than in

virtually any other type of judicial proceeding, we think district judges, when making evidentiary decisions in these cases, should be mindful of the heavy burden placed on claimants.

Agent Michaelis's testimony included an account of his investigation of Santacruz-Londono and his associates, as well as opinions about their money-laundering activities. Judge Weinstein's determination that his testimony would help the jury was neither "manifestly erroneous" nor a "clear abuse of discretion". Especially in light of the jury instructions explaining that the government had not given Michaelis's expert testimony in writing to opposing counsel when they should have, and that an expert's opinion should not be substituted for the jury's own conclusions, we con-

clude that the claimants were not prejudiced by Agent Michaelis's testimony.

3. Denial of Motion for Judgement Notwithstanding the Verdict.

At the end of the trial, Judge Weinstein denied the Atlantico Claimant's motion for a judgement notwithstanding the verdict. See Fed. R. Civ. P. 50(b). On appeal, the Atlantico Claimant's contend that the district court erred in denying their motion, because the government presented no evidence connecting their funds with narcotics activity.

We review the district court's decision on a motion for judgement notwithstanding the verdict de novo. Song v. Ives Laboratories, 957 F.2d 1041, 1046 (2d Cir. 1992). Therefore, we can disturb the jury's verdict only if we

can say, "without considering either the credibility of witnesses or the weight their testimony deserves, that the only conclusion a reasonable factfinder could have reached" is one favoring the Atlantico Claimants. Enercomp, Inc. v. McCorhill Publishing, Inc., 873 F.2d 536, 541 (2d Cir. 1989). In other words, there must be "`such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or * * * such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.'" Song, 957 F.2d at 1046.

Given the overwhelming evidence linking the Atlantico Claimants to drug trafficking and money laundering, the

district court properly denied their motion for judgement notwithstanding the verdict.

D. Internal Revenue Service Levy.

On July 29, 1992, the IRS served a notice of Levy on the clerk of the United States District Court for the Southern District of New York to surrender the funds that were about to be released to Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. The IRS asserted that these two claimants were "nominees or alter egos" of Johnny Daccarett, a delinquent taxpayer who owed the IRS in excess of $3 million. Because Judge Weinstein's judgment, dated August 5, 1992, directed the clerk to issue a check for those funds to counsel for the Atlantico Claimants, the clerk requested clarification from the court. At that

point the government moved to amend the judgement to direct the clerk to honor the IRS levy. Instead of amending the judgement, Judge Weinstein simply entered an order authorizing the clerk of the court to comply with the levy -- which he did, on September 9, 1992.

Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. claim that Judge Weinstein erred in permitting execution of the IRS levy because (1) the government failed to show that it was issued in accordance with 26 U.S.C. § 7429(a); (2) the Anti-Injunctive Act prevents it, 26 U.S.C. § 7421; (3) Johnny Daccarett has no proprietary interest in their businesses; and (4) the government was circumventing the federal interpleader statute and the Federal Rules of Civil Procedure.

In response, the government argues that the only grounds for noncompliance with an IRS levy are that (1) the entity served with the levy is neither "in possession of" nor "obligated with respect to" the requested property, or (2) the taxpayer's property is "subject to an attachment or execution under any judicial process." 26 U.S.C. § 6332. Since the validity of the levy and competing claims to the ownership of the funds are not valid reasons for refusing to honor a levy, the court properly directed the clerk to honor the IRS's levy.

If Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. want to pursue their challenge the IRS claim, they must bring a separate wrongful levy action. 26 U.S.C. § 7426.

CONCLUSION

As the use of civil forfeiture against the proceeds of narcotics trafficking increases, it is important to remember that the pertinent statutes are not legislated exceptions to the fourth amendment. Given the relative ease with which the statutory scheme allows the government to seize suspect properties, it is imperative for courts to analyze carefully the forfeiture process in light of the fifth amendment's due process demands and the fourth amendment's probable-cause and warrant requirements. Having done so in this case, we conclude that the government carefully complied with both its statutory and constitutional obligations.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October, one thousand nine hundred and ninety-three.

Present: HON. JAMES L. OAKES,
HON. LAWRENCE W. PIERCE,
HON. GEORGE C. PRATT,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPERESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No.

044000804961700114433 held at The MERRILL LYNCH BANK 1 Columbus ; PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO OCAMPO; ANA MILENA SANTACRUZ; RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA.; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTD.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC., BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTENA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLUMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS. LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON LIMITADA; MANUFACTURAS DE MODAS LTDA; INCOLO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants.

EMPERESA NELSON GOMEZ,
O. "FASTER" and COSTAFAST,

Counter-claimants.

Petitions for rehearing having been filed herein by Defendants-Appellants, Abuchaibe Hnos. Ltda, Manufacturas Internacionales Ltda, Organizacion J.D. Ltda, Manufacturas JD Ltda, Comercial Samora Ltda, Creaciones Viviana Ltda, Comercial Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Manufacturera del Atlantico Ltda, Industrias Marathon Limitada, Manufacturas de Modas Ltda, Incolco Ltda, Creaciones Karen, Tote Export Manufacturas Ltda, Creaciones Ivonne, Confecciones Zuny and Valery Fashions,

Upon consideration by the panel thereof, it is

Ordered that said petitions be and it hereby are DENIED.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk

By:

/s/ Carolyn Campbell
Carolyn Clark Campbell
Chief Deputy Clerk